

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

July 31, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-0692-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CORI E. JEFFERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vernon County:
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

VERGERONT, J.¹ Cori Jeffers appeals from her conviction and sentence for resisting an officer, a Class A misdemeanor, contrary to § 946.41(1), STATS. On appeal she contends that the trial court erred when it denied her motion for dismissal of the charges without an evidentiary hearing and that it

¹ This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

erroneously exercised its sentencing discretion when it withheld sentence, placed her on probation for one year, and included as a condition of probation ten days in the county jail. We conclude that the court did not err in denying the pretrial motion without an evidentiary hearing and that it properly exercised its sentencing discretion. We therefore affirm.

Jeffers was charged with battery to an officer, a Class D felony, contrary to § 940.20(2), STATS., and resisting an officer. The complaint alleged as follows. Officers responded to a call from a citizen who had just observed a male striking a young female, throw her into a car, and then go into a trailer. The male was Cori's husband, David Jeffers. He was arrested after the officers entered the trailer. As they were walking David outside, Cori grabbed at David and tried to get a wallet out of his pocket. One of the officers tried to get Cori away from David and, as another officer also tried to do so, Cori struck that officer on the back of his arm. She was then told she was under arrest, but refused to put her hands behind her back so that she could be handcuffed and instead held both hands in front of her upper body area. She continued to resist in this manner until one officer took one hand and another took her other hand and placed them behind her back to handcuff her. She remained uncooperative and resistive to these attempts.

A preliminary hearing was held on the felony battery charge and Cori was bound over for trial.

David was charged with disorderly conduct and resisting an officer. The presiding judge in that case dismissed the charges on the ground that, although the officers had probable cause to arrest him for battery to the young girl, their warrantless entry into the trailer to effectuate the arrest was unlawful because there were no exigent circumstances.

After the charges against David were dismissed, Cori moved for dismissal of the charges against her, asking for an evidentiary hearing on “the issues of whether [the officers] were acting within their lawful capacity and with lawful authority.” The motion was entitled “Defendant’s Motion of Pre-Trial Hearing on Issues of Illegal Entry and Unlawful Arrest and Dismissal of Charges.” The motion asserted that an element of the resisting charge was that the officers were acting with lawful authority, which was a question of law, and that whether the officers were acting with lawful authority was also pertinent to Cori’s defense of self-defense to the battery charge.

The court held a hearing on the motion at which it heard argument from counsel. Defense counsel argued that because the officers acted unlawfully in entering the trailer, they were acting without lawful authority for purposes of the charges against Cori, and because this was a Fourth Amendment violation she was entitled to an evidentiary hearing on this issue. The trial court asked for authority that the court, rather than the jury, was to rule on whether the officers were acting under lawful authority, since this was an element of the resisting charge and of the defense to the battery charge, according to defense counsel. Defense counsel was not able to provide specific authority. The court therefore denied the motion.²

² We do not agree with Cori that the court denied the motion on the ground that Cori had had a preliminary hearing and therefore erred in confusing the function of a preliminary hearing on a felony charge with the function of an evidentiary hearing on a motion challenging the constitutionality of an arrest. Defense counsel’s argument to the trial court, in spite of a brief and unexplained reference to the Fourth Amendment, appeared to be directed at the sufficiency of the evidence to support the charges in that the focus of the argument was on an element of the resisting offense and an element of her defense to the battery charge. It was in the context of explaining that Cori was not entitled to a pretrial evidentiary hearing on the elements of the offense and of her defense that the court stated that Cori had already had a preliminary hearing and “that’s all [she is] entitled to under the circumstances.”

Cori renewed her motion, this time titling it “Motion to Suppress.” In this motion she argued that she was entitled to a hearing to challenge whether there was probable cause to arrest. However, the argument in the motion is directed, not to probable cause for her arrest, but to probable cause for David’s arrest and the lawfulness of entry into the trailer to effectuate his arrest. The court responded to this renewed motion with a letter setting forth its reasoning for denying the motion. The court stated that the ruling on the motion to dismiss in David’s case had no bearing on the charges against Cori. The court noted that the defense had not presented any authority for the proposition that the illegal entry into the trailer to effectuate David’s arrest was a basis for suppression of evidence or dismissal of the charges against Cori, which charges stemmed from her alleged interference with the officers after they left the trailer and while taking David to the squad car. The court explained in more detail why the issues of “official capacity” and “lawful authority” properly related to the officers’ acts in arresting Cori for battery, not in arresting David.

After a jury trial, Cori was acquitted of the battery charge and convicted of the resisting charge. The court withheld sentence, placed Cori on probation for one year, and imposed these conditions of probation: (1) a psychological examination and compliance with any recommendations; (2) an anger management course; (3) a fine of \$350 plus court costs; (4) twenty hours of community service; and (5) ten days in the county jail with work release privileges.

Cori’s first contention on appeal is that the trial court erred in denying her motion without an evidentiary hearing. Unfortunately, her legal theory is confused before this court, as it was before the trial court. We agree with her statement that we should look at the substance of the motion and not limit our

review because of the title or terminology. We will, however, limit our review to the resisting charge, since she was acquitted on the battery charge. As best as we can untangle her arguments, she contends that she was entitled to a dismissal of the complaint based on its insufficiency and also contends that she was entitled to an evidentiary hearing to challenge probable cause for her arrest. We conclude that neither position has merit.

Regarding the sufficiency of the complaint, Cori does not develop this argument beyond stating that she has a “right to file a pre-trial motion to dismiss the misdemeanor charge by challenging the sufficiency of the information, just as a defendant can do when misdemeanors are charged in a complaint pursuant to § 971.31(2), STATS.” She does not explain to this court why the complaint is insufficient to properly allege the offense of resisting an officer, and she never argued that to the trial court. In fact, both the initial motion and the renewed motion were directed to obtaining an evidentiary hearing, which is not required to test the sufficiency of the complaint. We generally do not consider issues not raised before the trial court, *see Wengerd v. Rinehart*, 114 Wis.2d 575, 575-80, 338 N.W.2d 861, 865 (Ct. App. 1983), and we do not consider arguments that are insufficiently developed on appeal. *See Fritz v. McGrath*, 146 Wis.2d 681, 686, 431 N.W.2d 751, 753 (Ct. App. 1988). We therefore will not further address the issue of the sufficiency of the complaint.

Cori’s argument on the lawfulness of her arrest is based, as it was before the trial court, on the lawfulness of the officers’ acts in arresting David. We understand Cori’s contention to be that when Cori resisted the officers, they were not acting with lawful authority because they were at that time leading David to the squad car after taking him into custody by unlawfully entering the trailer.

The elements of resisting arrest are: (1) the defendant resisted the officer; (2) the officer was doing an act in an official capacity; (3) the officer was doing an act with lawful authority; and (4) the defendant knew the officer was an officer acting in an official capacity and with lawful authority and the defendant knew her conduct would resist the officer. WISCONSIN J I—CRIMINAL 1765 (Resisting an Officer). Acting in an “official capacity” means performing duties the officer was employed to perform. *Id.* Acting with “lawful authority” means acting in accordance with the law. *Id.*

In determining whether probable cause exists, we look to the totality of the circumstances to determine whether the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe a crime was being committed—in this case, the crime of resisting an officer. *See State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). Although Cori frames the issue, at least in her appellate brief, as whether she is entitled to an evidentiary hearing on probable cause for her arrest, she does not discuss with any specificity what the factual and legal issues are with respect to probable cause for her arrest for the offense of resisting an officer. Presumably the acts that constituted resisting by Cori were her refusal to put her hands behind her back, resisting the officers’ efforts to get her hands behind her back, and requiring two officers to accomplish that. This occurred when the officers were arresting her for battery. At the preliminary hearing, the court found there was probable cause to believe that the battery occurred. We cannot readily perceive why the officers did not have probable cause to arrest her for resisting the arrest for battery, and Cori does not enlighten us. We agree with the trial court that, as a matter of law, the unlawfulness of David’s arrest does not, in itself, establish that the officers did not

have probable cause to arrest her for resisting when they attempted to arrest her for battery.

Since the unlawfulness of David's arrest was the only basis on which Cori argued that her arrest for resisting was unlawful, we agree with the trial court's ruling that an evidentiary hearing was unnecessary. Cori wanted an evidentiary hearing to establish that the acts of the officers in arresting David were unlawful. However, the threshold legal issue was whether that was at all relevant to the existence of probable cause to arrest Cori for resisting an officer. An evidentiary hearing was not required for that purpose; the hearing at which the court heard legal argument and the court's consideration of the renewed motion and written argument were sufficient for resolution of the legal issue. Having correctly decided that issue, there was no need for an evidentiary hearing: even if the court heard the evidence and agreed with Cori that the officers acted unlawfully in entering the trailer and taking David into custody, that would still not show that there was no probable cause to arrest her for resisting when she was arrested for battery. A trial court need not hold an evidentiary hearing when the defendant does not present any factual scenario or legal theory on which he or she could prevail as the result of an evidentiary hearing. *See State v. Garner*, 207 Wis.2d 520, 534-35, 558 N.W.2d 916, 922 (Ct. App. 1996).

We next address Cori's contention that the trial court erroneously exercised its sentencing discretion because it took David's conduct into account as an aggravating factor. We reject this argument because we conclude that the trial court did not consider David's conduct as an aggravating factor but rather referred to it in describing the context of the events that occurred.

Sentencing is committed to the sound discretion of the trial court, and our review is limited to determining whether there has been a clear abuse of that discretion. *McCleary v. State*, 49 Wis.2d 263, 278, 182 N.W.2d 512, 520 (1971). The primary factors a court must consider in fashioning a sentence are the gravity of the offense, the character of the offender, and the need for public protection. *Id.* at 274-76, 182 N.W.2d at 518-19. The court may also consider, among other things, the defendant's criminal record; history of undesirable behavior patterns; personality, character and social traits; results of a presentence investigation; vicious or aggravated nature of the crime; degree of culpability; demeanor at trial; age, educational background and employment record; remorse, repentance and cooperativeness; need for close rehabilitative control; rights of the public and length of pretrial detention. *State v. Iglesias*, 185 Wis.2d 117, 128, 517 N.W.2d 175, 178 (1994).

Cori cites certain portions of the court's remarks in which it referred to David as the "primary problem here;" stated, "If Mr. Jeffers had responded as I think 90 percent of the people in this country would ... we wouldn't be here today;" and stated, "A lot of it has to lay at the feet of Mr. Jeffers, frankly, as opposed to Mrs. Jeffers, who as her attorney points out, is a young woman." We have read the entire record of the court's remarks in sentencing. The only reasonable reading of these cited portions, when placed in context, is that the court was recognizing that David was responsible for creating the initial situation, to which Cori responded by the acts leading to her arrest. Rather than considering David's behavior as an aggravating factor to increase sanctions against Cori, the court was acknowledging that Cori's relatively lesser role was a mitigating factor for her.

Nevertheless, the court pointed out that Cori, as well as David, “acted like abusive and foul mouthed children.” It noted she had an

extremely bad attitude, in the Court’s opinion, which came across in her testimony here today. This attitude that everybody’s picking on me, I’m right, everybody else is wrong. There’s no question that she improperly and unnecessarily interfered with these officers as they were attempting to take Mr. Jeffers from the scene and she had no business doing that. She had no business cursing and yelling and carrying on.

In explaining why the court felt ten days in jail was appropriate, the court stated:

If I saw an ounce of remorse on the part of this defendant, I would not consider a jail term. I might consider simply a fine in this matter. But I don’t see any remorse. I see—just the opposite. I see this notion, I’m picked upon and I’m going to get even in some fashion. Which is not supported by the evidence in this case.

The court repeated at the conclusion of its comments that it would not normally consider the jail term but for the lack of recognition by Cori that anything she did was wrong.

There is no indication in the record that the trial court imposed the ten-day jail condition, or was harsher in any way, because of David’s conduct. Rather, the trial court consistently and properly focused on Cori’s conduct. We conclude the trial court properly exercised its sentencing discretion.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

